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Supreme Court, U.S.
FILED

96 247 AUG 14 1996

Case No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1996

WILLIAM SCOTT BEVIL

Petitioner,

v.

THE STATE OF GEORGIA

On Petition for Writ of Certiorari
To The Supreme Court of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER TRIAL COUNSEL'S REFUSAL TO READ DISCOVERY EVIDENCE OBTAINED UNDER A BRADY REQUEST IS OBJECTIVELY REASONABLE UNDER STRICKLAND V. WASHINGTON?

II. WHETHER TRIAL COUNSEL'S REFUSAL TO READ DISCOVERY EVIDENCE OBTAINED UNDER A BRADY REQUEST IS A PER SE SHOWING OF DEFICIENT PERFORMANCE UNDER STRICKLAND V. WASHINGTON?

III. WHETHER TRIAL COUNSEL'S STIPULATING TO THE SWEARING OF THE JURY IS AN IMPERMISSIBLE WAIVER OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY?

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The opinion of the Georgia Court of Appeals, whose judgment is herein sought to be reviewed, is Bevil v. State, 467 S.E.2d 586 (1996).

BASIS FOR JURISDICTION

The judgment of the Georgia Court of Appeals was entered on January 9, 1996. Motion for Reconsideration was denied January 24, 1996. The Georgia Supreme Court denied certiorari on April 25, 1996. Reconsideration of the Denial of Certiorari was denied May 17, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE

Petitioner was indicted on a four count indictment for child molestation on July 29, 1994. Counts I and II alleged child molestation, and Counts III and IV alleged aggravated child molestation. All the charges were alleged to have occurred between August 1, 1989, and December 31, 1991, to the same individual (R. at 3-6).

On August 22, 1994, Petitioner's trial counsel filed his Notice to Produce, Demand for Copy of Indictment, List of Witnesses and Motion for Discovery. (R. at 12-16).

At arraignment on September 2, 1994, Petitioner's trial counsel was served copies of the indictment, list of witnesses, Petitioner's oral statement, and copies of the alleged victim's medical records from Dr. Daniel Goodman and Dr. David Smith. (R. at 17-25). While, trial counsel read and understood portions of the medical records, he refused to read or decipher some of the notes. Id.

Thereafter on November 29, 1994, the case came on for trial before the Honorable Hilton Fuller and a jury in the Superior Court of Dekalb County (T.T. Vols. I and II). At trial, trial counsel and the State stipulated that it was not on the record that the jury had been sworn. (T.T. at 79). Trial counsel did not see the jury sworn (see affidavit, Appendix F-27) nor did the record reflect that the jury was ever sworn. (T.T. at 13-22). On December 1, 1994, the jury rendered a verdict finding the Petitioner guilty on all counts (R. p. 38; T.T. p. 250).

On February 7, 1995, the Petitioner through new counsel filed his Opposition to Imposition of Sentence, Motion for Declaration of

Nullity, Brief and Affidavit, alleging that Petitioner's trial violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (R. at 50-56). The same came on for a hearing on February 14, 1995 and was denied (Motion and Sentencing Hearing before Judge Flake, T. at 1-101; R. at 66). The Petitioner then received a sentence on Counts I, III, and IV of 12 years, 4 years to serve with the balance on probation (Count II merged with Count IV), applicable surcharges with all counts to run concurrent. (Motion and Sentencing before Judge Gail Flake at 99-100; R. at 65).

Petitioner filed his Motion for New Trial on March 10 and amended same April 27, 1995. (R. at 101-118, 126-129). Petitioner again alleged that an unsworn jury violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as alleging that Petitioner was not provided the constitutionally guaranteed effective assistance of counsel. The motion came on for a hearing on April 27, 1995 (New Trial T. at 1-74) and a subsequent hearing on May 12, 1995 (New Trial T. at 1-148). Petitioner presented testimony by trial counsel that he did not hear or see the jury sworn (R. at 7), by Judge Fuller that it is his practice to swear the jury but that he did not remember specifically administrating the oath (R. at 35), by the court reporter that she never saw the jury sworn (R. at 35), and by Petitioner that he never saw the jury sworn (R. at 40). Petitioner's Motion for New Trial was denied on June 23, 1995. (R. at 164-167). The State offered no rebuttal evidence that the jury was sworn. The court was satisfied that "trial counsel testified that he did not read the medical reports contained in the State's file in that he believed them to be

illegible, privileged at trial and irrelevant to his good character defense" and that "[t]he jury was properly sworn." (See Court's Order, Appendix F [1]).

Petitioner filed his Notice of Appeal on July 5, 1995, alleging as above (R. at 1-2). Thereafter on January 9, 1996, the Court of Appeals affirmed the trial court's decision. The Court of Appeals denied Petitioner's Motion for Reconsideration on January 24, 1996. In its decision, the court was willing to approve the swearing of the jury even by stipulation: "[a]ll presumptions are in favor of upholding the verdict and the record affirmatively shows that the oath was administered, albeit by stipulation." Bevil v. State, 467 S.E.2d 586, 588-89 (1996)(emphasis added). The court also adopted the language of the trial court that "trial counsel testified that he did not read the medical reports contained in the State's file in that he believed them to be illegible, privileged at trial and irrelevant to his good character defense" but nevertheless found that such was not ineffective assistance of counsel. Id. (emphasis added). Motion for Reconsideration was denied January 24, 1996.

Petitioner petitioned the Georgia Supreme Court for a writ of certiorari on February 13, 1996, alleging as above. The Petition for Writ of Certiorari was denied on April 25, 1996. Reconsideration of the denial of certiorari was denied May 17, 1996.

REASONS FOR GRANTING THE WRIT

The judgment of the Georgia Court of Appeals (certiorari denied, Georgia Supreme Court) should be reviewed because that decision circumvents Constitutional guarantees of a fair trial for criminal defendants.

This Court has explained that "[t]he Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 684-685 (1984). Such elements include: speedy and public trial, impartial jury, confrontation with accusers, and assistance of counsel. U.S. CONST. amend VI. Also essential to a fair trial is the prosecution's disclosure of evidence favorable to the accused which is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963).

In this case, Petitioner did not receive a fair trial as Petitioner's trial counsel denied him two of the constitutionally requisite elements. Specifically, Petitioner's trial counsel refused to read a portion of the discovered documents after a Brady request and effectively waived a jury trial by stipulating the swearing of the jury.

I. PETITIONER'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND V. WASHINGTON.

The Georgia Court of Appeals and the federal circuit courts differ in their formulation of the duties of defense attorneys concerning discovery materials. Both the Seventh and Eighth Circuits have held that failure to examine discovery materials or failure to

adequately examine discovery materials constitute deficient performance. Georgia courts, however, ignore the mandate of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment. Petitioner prays this Court resolve this issue.

A. Trial counsel's performance was deficient because ignoring potential impeachment evidence in a credibility contest is not objectively reasonable.

The Sixth Amendment guarantees a criminal defendant charged with a serious crime the right not merely to counsel, but to the effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 654 (1984). Any other interpretation of that right would permit a serious risk of injustice to infect criminal trials. Cuyler v. Sullivan, 446 U.S. 335, 343 (1980). "Absent competent counsel, ready and able to subject the prosecution's case to the 'crucible of meaningful adversarial testing,' there can be no guarantee that the adversarial system will function properly to produce just and reliable results." Lockhart v. Fretwell, 506 U.S. 364, 377 (1993)(Stevens, J., dissenting) (quoting United States v. Cronic, 466 U.S. 648, 654 (1984).

The test for claims of ineffective assistance of counsel is twofold: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. In examining questions of deficient performance, courts distinguish pretrial preparation from trial strategy decisions. See Burger v. Kemp, 483 U.S. 776 (1987); Darden v. Wainwright, 477 U.S. 168 (1986); United States v. Gray, 878 F.2d 702

(3d Cir. 1989). "Strategic choices made after thorough investigation of law and facts relevant to plausible opinions are virtually unchallengeable." Strickland, 466 U.S. at 690. However, closer scrutiny is given an attorney's preparatory activities; "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. In this case, Petitioner's trial counsel was ineffective because his cursory review of medical records provided by the state fell below "an objective standard of reasonableness." Id. at 688. Alternatively, trial counsel was deficient in that his refusal to read documents obtained through a Brady request is a per se showing of deficient performance.

In a similar case, the Seventh Circuit held that a trial attorney's failure to read a letter obtained through discovery which the alleged victim had written outlining the abuse was not objectively reasonable. Williams v. Washington, 59 F.3d 673 (7th Cir. 1995). As with the case at bar, the case was formulated as a mere credibility contest between the alleged victim and the defendant, and, on appeal, the state argued that as such counsel was excused from familiarizing himself with the letter. Id. at 680. However, the court explained that "[w]e cannot imagine a plausible excuse for a decision not to read discovery materials voluntarily provided by the State" and that "[a]n attorney rather clearly has a duty to familiarize himself with discovery material provided by the State." Id. The court highlighted the letter's potential to impeach the defendant's accuser's testimony.

The Eighth Circuit has ruled in a similar manner. In a recent case, counsel was found deficient in not looking at the medical

examiner's file in a murder prosecution because the file contained photographs which could be used to cross-examine state witnesses. Sherron v. Norris, 69 F.3d 285 (8th Cir. 1995). The circuit also has held that merely reviewing a three-page summary of key tests on the murder weapon is not objectively reasonable. Driscoll v. Dole, 71 F.3d 701 (8th Cir. 1995). "Considering the circumstances as a whole, defense counsel's failures to prepare for the introduction of the ... evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression ... fall short of reasonableness under the prevailing norms." Id. at 709.

Petitioner's trial counsel had, in hand, the alleged victim's medical records prepared by Dr. Smith and Dr. Goodman. While trial counsel read and understood the lab reports and some of the notes, he refused to decipher other notes in the same reports. (R. at 18-19). Trial counsel excuses his omission by showing that he had Petitioner take a physical and would use the physical and Petitioner's medical records to rebut any charge of venereal disease (which is itself illogical in that there was never any allegation or evidence of venereal disease). (Motion for New Trial April 27, 1995, at 29). Petitioner's trial counsel glanced through the materials apparently looking only for evidence of venereal disease. The Court of Appeals was satisfied that "trial counsel testified that he did not read the medical reports contained in the State's file in that he believed them to be illegible, privileged at trial and irrelevant to his good character defense." Bevil v. State, 467 S.E.2d 586, 589 (1996). However, trial counsel's reliance on their

privileged status was based on a misunderstanding of the law as the documents were no longer privileged, and their value to his so-called defense was profound.

Trial counsel's omission is manifestly unreasonable in light of the evidence against Petitioner and trial counsel's own strategy. The testimony and statements of the alleged victim and the testimony of his mother were the strongest evidence against Petitioner. Trial counsel's strategy was to show the absurdity of the charge by letting in all of the evidence. (Motion for New Trial May 12, 1995, at 68). Trial counsel ignored prime impeachment evidence against the alleged victim and mother, which in itself would have shown the absurdity of the charge. Trial counsel's failure to prepare for cross-examination and his refusal to examine evidence which would have supported his own strategy constitute deficient performance.

B. Defense counsel's refusal to read the discovery documents prejudiced Petitioner because counsel was left unprepared and unable to refute defense claims and impeach key defense witnesses.

The second prong of the Strickland test is whether defense counsel's defective performance resulted in any prejudice to the defendant. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Petitioner was prejudiced by trial counsel's refusal to read

portions of discovery documents because counsel was left unprepared and unable to refute defense claims and to impeach key defense witnesses. As there was no eyewitnesses nor any physical evidence other than the letter written by the alleged victim, revealing their lack of credibility was key to the defense. The mother of the alleged victim testified under oath that her son was a "normally happy boy," "a regular kid," "a pretty well-rounded kid." (T.T. at 135; Motion for a New Trial May 12, 1995, at 18-24). Had trial counsel read Dr. Smith's notes which had been given to him by the State, he would have known that the mother had reported that her son had the emotional disorder enuresis and that both of her children were "seeing a psychologist for counseling due to divorce." (A divorce which had occurred over fourteen years ago, T.T. at 112). Furthermore, on the day before the accuser made his allegations, Dr. Smith's medical notes show that he was "clinging to father" and had an "attitude" with mother and brother. (Motion for a New Trial April 27, 1995, at 65) (See also Motion for a New Trial May 12, 1995, at 6-11).

Had trial counsel read Dr. Goodman's notes he would have found that six months before seeing Dr. Smith both patient and mother reported that he also suffered from the psychotic disorder bipolar illness or manic depression (Motion for New Trial May 12, 1995, at 18-19) and that the patient had been referred for insurance purposes back to the same psychologist he had been seeing for several years, Dr. Craig Rich. (Motion for New Trial April 27, 1995, at 67; Motion for New Trial May 12, 1995, at 17-22).

Had trial counsel taken the time to examine the records he

could have more fully and completely exposed the influence of Dr. Rich at the January 5th meeting with all the family members which included discussions of homosexuality and the extended insurance coverage. This meeting occurred eight days after the patient allegedly dated and mailed his letter to Dr. Smith as well as eight days before Dr. Smith received the letter. Had trial counsel read and examined these medical records he could have pursued cross-examination on the inconsistencies of the date of the letter and receipt of the letter and the influence of the psychologist for the referral of insurance coverage rather than withdraw his questions on these matters. (T.T. at 94-99; Motion for a New Trial May 12, 1995, at 12-14).

Had trial counsel read the records he would have known that the day before the alleged victim made the allegations, he had an "attitude" with his mother and brother and stated that he wanted to see his mother cry when he told her he had been abused (T.T. at 104, Motion for a New Trial April 27, 1995, at 65). Counsel could have been prepared to attack both the alleged victim and his mother's testimony when they stated that they had a "great relationship." (T.T. at 73-74, 122; Motion for a New Trial May 12, 1995, at 26-28).

With all this information trial counsel could have inquired into the family's dependency on their psychologist, Dr. Rich. The entire family had been seeing Dr. Rich every other week for four to six years (T.T. at 94-95, 126). They also went to various medical doctors in order to get referred back to Dr. Rich for insurance purposes (Motion for New Trial April 27, 1995, at 65 and 67).

Ignoring these medical reports left trial counsel unprepared

and unable to examine witnesses, particularly the alleged victim as to his emotional state, his psychotic condition, his conflicts with his mother, and his clinging to his father the day before he allegedly wrote the letter. (T.T. at 254). Furthermore, in these medical reports lay the reasons for the victim's failure to articulate the details of the abuse without the help of the interviewing police officer's leading questions. Instead of describing physical pain and abuse, the alleged victim insisted that he was only hurt emotionally (T.T. at 99-100). He also admitted that he persistently telephoned Petitioner (twenty-five calls) after the alleged abuse wanting him to come back to the family. (T.T. at 100-103). He said he wanted to see his mother cry (T.T. at 104) [If he was clinging to his father the day before, did he want to hurt her emotionally as she had hurt him by causing his father to go away?]. His description of the pain of the alleged sexual attacks as only an "emotional" hurt is inexplicable and contradicts all reason, but it was left unchallenged by counsel's cross-examination. (T.T. at 100). See the conclusions of Deloris Roys of the Highland Institute of Behavioral Change who declares the accuser's benign descriptions, lack of detail and lack of pain as clearly "atypical" of people who are actually molested (R. at 98-100).

Without this information trial counsel was left unarmed for a full cross-examination and therefore (as trial counsel himself complained) was limited to the kind of cross-examination which would only give the jury the appearance of "bullying the boy" and his mother (Motion for New Trial May 12, 1995, at 22-28, 50-51). In addition, trial counsel could have probed further the incomplete

answer given by Dr. Smith on cross-examination. On cross, counsel asked Dr. Smith if he had a discussion with the alleged victim "about his emotional life, or his personal life when you did his physical?" (T.T. at 40). The doctor's answer was "not in any great detail." (T.T. at 40). This is in contradiction with his notes that outlined that the mother had reported to him that her son suffered from enuresis and that both children were seeing a psychologist.

Strickland merely requires "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Considering the importance of the accuser and his mother's testimony and the loss of opportunities to undermine their credibility by counsel's failure to read discovery, there is a reasonable probability that the jury would have acquitted Petitioner.

The Seventh and Eighth Circuits have protected the rights of criminal defendants by ruling that ignoring evidence provided by the State during discovery is deficient performance under Strickland. This Court's refusal to review this decision would encourage defense counsel to neglect their awesome responsibilities in the defense of the accused and would validate practices in violation of the Sixth and Fourteenth Amendments' guarantee of a fair trial. As such, we pray this Court grant this Petition for Certiorari.

II. DEFENSE COUNSEL'S REFUSAL TO READ DOCUMENTS OBTAINED UNDER A BRADY REQUEST IS A PER SE SHOWING OF DEFICIENT PERFORMANCE BECAUSE THE PROSECUTOR'S DUTY UNDER BRADY

NECESSARILY CONTEMPLATES DEFENSE COUNSEL READING THE DISCOVERY.

This Court refuses to outline any mechanical or specific rules for the constitutional performance of counsel's duties. Id. at 688. However, the reasoning of Brady v. Maryland demands that defense counsel at least read the materials provided by the state.

In Brady v. Maryland, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Both Strickland and Brady have as their purpose the assurance that criminal defendants are afforded fair trials. In fact, the standard for prejudice in Strickland "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution ... and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." Strickland, 466 U.S. at 694.

Under Brady, prosecutors may not prevent defense counsel from making use of evidence material either to guilt or punishment. By requiring prosecutors to disclose such evidence, the prosecutor's duty necessarily contemplates, at a minimum, that defense counsel will read the documents (or view visuals, etc.) and make informed decisions as to its strategic use. This is not to suggest that defense counsel has a duty to present all favorable evidence. See, Stevens v. Zant, 968 F.2d 1076, 1082 (11th Cir. 1992). Defense counsel's "strategic choices made after thorough investigation of law and facts

relevant to plausible opinions are virtually unchallengeable." Strickland, 466 U.S. at 690. However, the prosecutor's duty under Brady is rendered meaningless without the corresponding duty of defense counsel to at least read discovery documents from the state. Only upon the disclosure of exculpatory evidence by the prosecution and the informed and reasonable advice of counsel does the defendant secure the initial foundation of a fair trial.

To Petitioner's knowledge, this is a case of first impression. Without established law for direction on this issue, Petitioner and others similarly situated have no remedy. For this reason Petitioner prays that this Court grant this Petition.

III. TRIAL COUNSEL'S STIPULATING THE SWEARING OF THE JURY EFFECTIVELY WAIVES THE CONSTITUTIONAL GUARANTEE OF A TRIAL BY JURY.

A defendant's right to a jury trial in a nonpetit criminal case is unquestionable. U.S. CONST. art 3, § 2; U.S. CONST. amend VI. This right to a jury trial is applicable to the states in serious criminal cases by the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1967).

However, the necessity of a sworn jury has not been expressly recognized. To Petitioner's knowledge, this is also an issue of first impression. The only case decided by this Court that approaches the issues is Baldwin v. Kansas. 129 U.S. 52 (1889)(holding that the entry in the record that the jury was sworn is not an attempt to set out the form of the oath). In that case, where state statute prescribed the

swearing of the jury, this Court adopted the language of the Supreme Court of Kansas: "[i]t is highly important and necessary that the oath should be administered w' h due solemnity, in the presence of the prisoner, and before the court, substantially in the manner prescribed by law. It may also be conceded that the record should show that the jury were sworn." Id. at 55. (quoting State v. Baldwin, 36 Kansas (1886)).

The Sixth Circuit has recognized the right of criminal defendants to be present while the jury receives its oath. United States v. Martin, 740 F.2d 1352, 1358-59 (6th Cir. 1984), noted in United States v. Pinero, 948 F.2d 698 (11th Cir. 1981). In Pinero, the Eleventh Circuit, without recognizing the same, opines that presumptively "the Sixth Circuit would deem the swearing of the jury a requirement." 948 F.2d at 700 n.4. As this is a case of first impression with no clear guidance from the circuits and implicating the constitutional guarantee of a jury trial, Petitioner prays this Court resolve the issue.

A. Stipulating the swearing of the jury violates the Sixth Amendment because a jury does not exist until sworn.

Under either state statute or court rules requiring the oath, several state courts have recognized the importance of the administration of the oath to the jury. "The jury's oath is an essential element of the constitutional guarantee to a trial by an impartial jury." State v. Godfrey, 666 P.2d 1080, 1082 (1983). "In criminal cases it is essential to the validity of the cases that the jury should be sworn."

State v. Martin, 255 N.W.2d 844, 848 (1977).

1. The importance of the oath lies in its transformative effect on the prospective jurors.

The oath given to a jury is no mere formality. Steele v. State, 446 N.E.2d 353 (1983); Commonwealth v. Robinson, 176 A. 908 (1935). Its importance lies in its effect on the jury. "It is intended to impress upon the jury its solemn duty to carefully deliberate on the matter at issue." Steele 446 N.E.2d at 533 (1983). The oath is the juror's attestation that he or she will "do his [or her] duty according to the law to see that justice is done." People v. Pribble, 249 N.W.2d 363, 366 (1977). The swearing of the jury "is designed to protect the fundamental right of trial by an impartial jury." Id.

2. By definition, a jury is sworn.

Without this attestation, a duly constituted jury does not exist. People v. Bestle, 197 N.Y.S.2d 820 (1960). The Supreme Court of Georgia has explained that those "summoned as jurors must also be sworn before they constitute an organized and competent tribunal to which the issues in a cause can be submitted to trial." Slaughter v. State, 28 S.E.2d 159, 161 (1897). In People v. Fleiss, the California Court of Appeal reversed the defendant's conviction because of juror misconduct. 1996 WL 343357 (Cal. Ct. App.). The court relied upon Black's definition of a jury as "[a] certain number of men and women selected according to law and sworn ... to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them." Id. at 7. (quoting Black's Law Dict. (5th ed. 1979) p. 768, col. 1.)(emphasis added). The court explained that certain jurors "did not

act as a jury" as they "violated their oath." Id. Because of the violations, the defendant "did not truly receive a trial by jury." Id. A trial before an unsworn jury is a violation of the constitutional guarantee of a trial by jury. "A part, an absolutely necessary part, of jury trial is a sworn jury. This cannot be waived or dispensed with; without it there is no trial by jury." Commonwealth v. Robinson, 176 A. 908, 915 (1935).

3. The actual administration of the jury's oath is necessary for the attachment of other rights.

While the swearing of the jury is intrinsically part of a trial by jury, the administration of the oath is also important as a nexus for the attachment of other rights, specifically, the treatment and obligations of the jury and the defendant's protection against double jeopardy. In State v. Bohlen, the Missouri Court of Appeals addressed the state's duty regarding prospective jurors -- those selected but not sworn. The court held that "[w]hile the state has an affirmative duty to show the absence of influence on jurors, no affirmative duty is foistered on the state to show the absence of influence ... upon prospective jurors." 690 S.W.2d 174, 177 (1985). The court also found that the trial court was not required to sequester prospective jurors under the state statute because "[t]he jury does not exist until the veniremen selected therefor are sworn to service in that capacity." Id. at 177. See also, State v. Shaw, 636 S.W.2d 667, 671 (Mo. banc 1982). The obligations of the state regarding the jury does not attach until the jury is sworn.

The swearing of the jury is also important as the point of attachment for the defendant's protection against double jeopardy.

The Fifth Amendment of the United States Constitution provides that "No person shall ... be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. Double jeopardy was made applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969). In Downum v. United States, this Court held that the second trial of a criminal defendant after the first was sworn but then "discharged because a prosecution witness had not been served with a summons and no other arrangements were made to assure his presence" violated the Fifth Amendment's guarantee against double jeopardy. 372 U.S. 734, 737 (1963). In effect, Downum establishes that under the Fifth Amendment jeopardy attaches upon the swearing of the jury. "When the trial of indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is ... not made out against him." United States v. Watson, 28 Fed.Cas. 499, 500-501 (1868) quoted in, Downum, 372 U.S. at 738 n.1) See also Pribble, 249 N.W.2d 363, 366 (1977) (holding that "jeopardy could not attach in the instant case where the jury was not given the oath which would authorize them to serve as a jury.").

Not only duties under state law but also the fundamental protections against double jeopardy under the United States Constitution attach upon a swearing of the jury. As such, this Court should review this case and make explicit the constitutional right to a sworn jury.

B. Stipulation to the swearing of the jury is unconstitutional because it denies the defendant both trial by an

actually sworn jury and participation in the waiver of a constitutional right.

A stipulation is a mere "agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues." Arrington v. State, 233 So.2d 634, 636 (1970). Administration of the jury's oath is not an issue of proof or litigation; it is an essential trial procedure. "The oath given to a jury prior to the commencement of a trial is not a mere formality." Steele, 446 N.E.2d 353, 354 (1983). Stipulating the swearing of the jury precludes the actual administration of the oath. The actual oath is essential because of its effect on the prospective jurors. It is the juror's promise to "pay attention to the evidence, observe the credibility and the demeanor of the witnesses, and conduct themselves at all times, as befits one holding such an important position." Pribble 249 N.W.2d at 366 (1977). Stipulating the swearing of the jury satisfies only a pedestrian conception of judicial procedure and flies in the face of the United States Constitution.

Furthermore, in criminal proceedings, the defendant must personally participate in a waiver of a constitutional right. Humphrey v. Cady, 405 U.S. 504, 517 (1972)(holding that a waiver of state court remedies which would bar federal habeas corpus "must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision of default of his counsel.") An accused's waiver of a jury trial as guaranteed by the Constitution must involve "the express and intelligent consent of the defendant." Patton v. United States, 281 U.S. 276, 312 (1930). Here,

trial counsel's stipulation to the swearing of the jury was an unconstitutional usurpation of Petitioner's knowing waiver of a trial by jury. For these reasons, Petitioner prays this Court resolve these issues.

CONCLUSION

The charge of child molestation is the most devastating accusation in today's society because it brings with it emotionally charged prejudices. The title of the charge itself makes it extraordinarily hard for a defendant to receive a fair trial. The sentence imposed will always extend beyond what a court may set, a life of ostracism by society. For these reasons the accused must have the full protections of the Constitutional right to a fair trial. Wherefore this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Donn M. Peevy

DONN M. PEEVY
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APPENDIX A

OPINIONS BELOW

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: April 25, 1996

Donn M. Peevy

PEEVY & LANCASTER

P.O. Box 1264

Lawrenceville, GA 30246

Case No. S96CO830

WILLIAM SCOTT BEVIL V. THE STATE

COURT OF APPEALS CASE NO. A95A2501

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

/s/ Sherie M. Welch, Clerk

FIRST DIVISION

McMURRAY, P. J.,

ANDREWS and BLACKBURN, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 7, January 1, 1995)

January 9, 1996

In the Court of Appeals of Georgia

A95A2501. BEVIL v. THE STATE. BL-111C

BLACKBURN, Judge.

Following a jury trial, the appellant, William Scott Bevil, was convicted of, two counts of child molestation and two counts of aggravated child molestation. His motion for new trial was denied, and he now appeals.

1. In his first enumeration of error, Bevil contends he should have been granted a new trial because the verdict was not supported by the evidence. "However, this court passes only on the sufficiency of the evidence, not its weight. Sheats v. State, 210 Ga. App. 622, 623 (2) (436 SE2d 796) (1993) . Brown v. State, 214 Ga. App. 838 (449 SE2d 538) (1994) . The victim graphically testified as to Bevil's illegal sexual contact with him. Other evidence established that these incidents occurred in DeKalb County when the victim was under the age of 14. Viewed in a light most favorable to support the

verdict, a rational trier of fact was clearly authorized to find Bevil guilty beyond a reasonable doubt of the offenses of which he was convicted. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. In his second and third enumerations of error, Bevil contends that the verdict was a nullity in that the jury was never administered an oath in accordance with OCGA § 15-12-139. We disagree.

Once the parties discovered that the jury's swearing in had not been made a part of the record, Bevil's trial counsel stipulated to the fact that the jury had been sworn in and the stipulation should be made a part of the record. Despite his stipulation, trial counsel, at a subsequent post-trial hearing, testified that he could not recall whether the jury had been sworn or not. All presumptions are in favor of upholding the verdict and the record affirmatively shows that the oath was administered, albeit by stipulation. Accordingly, we deem this enumeration of error to be without merit.

3. In his fourth enumeration of error, Bevil contends that the trial court erred by admitting certain photographs into evidence showing the victim and himself together at family functions. He argues that such photographs were inadmissible for lack of proper foundation, inaccuracy in depicting the scenes portrayed, and irrelevance.

However, the record reflects irrelevancy was the only objection raised at trial. "If counsel desires to preserve an objection upon a specific point for appeal, the objection must be made at trial upon that specific ground." (Punctuation omitted.) Norman v. State, 197 Ga.

App. 333, 334 (398 SE2d 395) (1990). Any error in admitting photographs that depicted Bevil's warm personal relationship with the victim and his family was harmless in that Bevil conceded such relationship at trial.

4. In his fifth enumeration of error, Bevil contends that the trial court erred in excluding as irrelevant, his cross-examination of the victim as to a conversation the victim had with his psychologist concerning homosexuality. The record shows that the victim testified out of the presence of the jury that he had discussed his brother's hatred for homosexuals, not his own. Absent a manifest abuse of discretion, a trial court's refusal to admit evidence on grounds of lack of relevance will not be disturbed on appeal, Chapman v. State, 215 Ga. App. 340, 341 (449 SE2d 903) (1994), and we decline to do so here. In any event, former counsel for Bevil withdrew the offending question, rendering the issue moot on appeal.

5. In his sixth enumeration of error, Bevil contends that the trial court erred by allowing a detective to testify about the capacity of child victims to specifically recall the dates when offenses against them took place. The detective testified that it was not unusual for child victims of multiple offenses to be unable to recall the exact dates on which such offenses occurred. The record reveals that the detective had 17 years experience in law enforcement, particularly in investigating sex offenses. He was trained in the techniques associated with interviewing the victims of such offenses, particularly children. In light of the detectives considerable experience, the trial court did not abuse its discretion in permitting him to testify as an expert wit-

ness. Fatora v. State, 185 Ga. App. 15, 19 (363 SE2d 566) (1987) (Whether a witness may testify as an expert is a question for the sound discretion of the trial court and, absent abuse, will not be disturbed).

6. By his eighth and ninth enumerations of error, Bevil contends that the trial judge erred by failing to recuse himself before the trial began. After the verdict was rendered the trial judge recused himself from the sentencing phase on the ground that he had a 25 year-old son who, as young man, had been molested by an older friend.

OCGA § 15-1-8 pertinently provides that a judge shall not sit in any case in which he has a pecuniary interest, a familial relationship with a party, or in any case in which he previously served as counsel or judge. "The grounds for recusal in [OCGA] § 15-1-8 are exclusive and exhaustive, and courts may not add other grounds of disqualification to those stated in the statute. [Cits.]" Johnson v. State, 208 Ga. App. 453, 454 (430 SE2d 821) (1993). None of these circumstances is applicable in the instant case.

Further authority indicates that a trial judge should be disqualified for bias against a party, if such bias "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case. The alleged bias of the judge must be of such a nature and intensity to prevent the defendant from obtaining a trial, uninfluenced by the court's prejudgment." (Citations and punctuation omitted.) Birt v. State, 256 Ga. 483, 485-486 (350 SE2d 241) (1986). There is no evidence of this in the record. Further, new counsel for Bevil declined the trial judge's offer to recuse himself from hearing Bevil's motion for a new

trial which was grounded upon the trial judge's failure to recuse himself from the trial of the case on the merits. Accordingly, we deem this enumeration of error to be without merit.

7. In enumerations of error 10 through 39, Bevil contends that he was denied effective assistance of counsel. Citing Cochran v. State, 262 Ga. 106 (414 SE2d 211) (1992), Bevil argues that pervasive evidence of ineffectiveness of counsel makes a particularized inquiry for prejudice under Strickland V. Washington, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984), unnecessary. His claims of ineffectiveness, however, are not supported in the record.

(a) Bevil asserts that trial counsel erred in failing to present defenses of alibi at trial. However, the record reflects that the trial counsel did present the defense of alibi at trial. While such evidence reflected that Bevil was working in North Carolina in the period June 1988 to March 1990, it also indicated that he returned to Georgia periodically.

(b) Bevil contends that trial counsel was ineffective when he allowed part of voir dire to be conducted outside Bevil's presence The trial court, as did trial counsel, advised Bevil of his right to be present during the voir dire of certain of the members of the jury. He declined to do so. "A party will not be heard to complain of error induced by his own conduct." (Citations and punctuation omitted.) Wells v. State, 212 Ga. App. 60, 62 (441 SE2d 460) (1994).

(c) Bevil claims generally that his trial counsel failed to prepare the case for trial, to interview witnesses, to read and examine medical reports, or to consult or subpoena psychological or psychiat-

ric experts. He further asserts that trial counsel relied on the prosecutor's open file policy in gathering information regarding possible witnesses and their statements. In this regard, trial counsel testified that he interviewed all defense witnesses prior to trial. 'While there had been witnesses which he did not interview before trial, he testified that he had not done so because he knew what the witnesses' statements would be, having reviewed the State's file and spoken with the prosecutor thereon. No testimony at trial surprised trial counsel. Trial counsel testified that he spoke with Bevil, in person or by telephone, once a week prior to trial; he met with him personally five to ten times; and he discussed Bevil's testimony with him on many occasions. Although trial counsel recommended that a private investigator not be employed, Bevil concurred in that recommendation. Further, trial counsel testified that he did not read the medical reports contained in the State's file in that he believed them to be illegible, privileged at trial, and irrelevant to his good character defense.

Bevil contends variously that trial counsel was ineffective for failure to challenge the admissibility of the State's evidence. Trial counsel defended his failures to object to the admission of State evidence at trial as necessary to allow him to "employ every discrepancy in the prosecution's case that we could develop" or to illicit sympathy for him. As to the latter, after discussing the matter with Bevil, trial counsel allowed the State's expert witness as to child victims to testify that Bevil had told him he had been molested as a child in order to minimize potential damage to his good character defense if introduced by the State. While by his brief, Bevil characterizes his trial counsels

trial strategy as "non-adversarial," the record reveals the contrary. Bevil's trial counsel filed pretrial discovery motions. He cross-examined the State's witnesses, including an exhaustive cross-examination of the victim. He established that the victim continued to call Bevil after he decided to stop seeing the victim's family; employing seven defense witnesses, he established Bevil's good character.

"Generally, the burden is on the defendant claiming ineffectiveness of counsel to establish (1) his attorney's representation in specified instances fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. The trial court's determination that an accused has not been denied effective assistance of counsel will be affirmed on appeal unless that determination is clearly erroneous. In the absence of testimony to the contrary, counsels actions are presumed strategic. The decisions on which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with the client." (Citations and punctuation omitted.) Hudson v. State, 218 Ga. App. 671, 672 (_SE2d_) (1995).

In denying Bevil's motion for new trial, the trial court found that "[Bevil] has not established that his trial counsels lack of independent investigation, trial strategy, or other conduct, rose to the level of harm authorizing a new trial." We have reviewed Bevil's claims of ineffective assistance and find the evidence of record insufficient as

to require a finding that trial counsels performance was deficient or that the defense was prejudiced thereby. We must affirm the trial court's finding that Bevil was afforded effective assistance of counsel since it is not clearly erroneous. That Bevil and present counsel would have proceeded differently does not establish the ineffectiveness of trial counsel. Hudson, supra. Accordingly, we deem this enumeration of error to be without merit.

8. In light of our disposition above, we need not reach the remaining enumerations of error.

Judgement affirmed. McMurray, P. J., and Andrews, J., concur.

Court of Appeals

of the State of Georgia

ATLANTA, JANUARY 12, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed.

A95A2501. BEVIL v. THE STATE.

It is hereby ordered that pages 4 through 9 be substituted in the original opinion dated January 9, 1996.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

January 12, 1996

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Masters III, *Clerk*

trained in the techniques associated with interviewing the victims of such offenses, particularly children. In light of the detective's considerable experience, the trial court did not abuse its discretion permitting him to testify as an expert witness. Fatora v. State, 185 Ga. App. 15, 19 (363 SE2d 566) (1987) (Whether a witness may testify as an expert is a question for the sound discretion of the trial court and, absent abuse, will not be disturbed).

6. By his eighth and ninth enumerations of error, Bevil contends that the trial judge erred by failing to recuse himself before the trial began. After the verdict was rendered the trial judge recused himself from the sentencing phase.

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256 Ga. 483, 485-486 (350 SE2d 241) (1986). There is no evidence of this in the record. Further, new counsel for Bevil declined the trial judge's offer to recuse himself from hearing Bevil's motion for a new trial which was grounded upon the trial judge's failure to recuse himself from the trial of the case on the merits. Accordingly, we deem this enumeration of error to be without merit.

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(b) Bevil contends that trial counsel was ineffective when he allowed part of voir dire to be conducted outside Bevil's presence. The trial court, as did trial counsel, advised Bevil of his right to be present during the voir dire of certain of the members of the jury. He declined to do so. "A party will not be heard to complain of error induced by his conduct." (Citations and punctuation omitted.) Wells v. State, 212 Ga. App. 60, 62 (441 SE2d 460) (1994).

(c) Bevil claims generally that his trial counsel failed to prepare the case for trial, to interview witnesses, to read and examine medical reports, or to consult or subpoena psychological or psychiatric experts. He further asserts that trial counsel relied on the prosecutor's open file policy in gathering information regarding possible witnesses and their statements. In this regard, trial counsel testified that he interviewed all defense witnesses which he did not interview before trial, he testified that he had not done so because he knew the witnesses' statements would be, having reviewed the State's file and spoken with the prosector thereon. No testimony at trial surprised trial counsel. Trial counsel testified that he spoke with Bevil, in person or by telephone, once a week prior to trial; he met with him personally five to ten times; and he discussed Bevil's testimony with him on many occasions. Although trial counsel recommended that a private investigator not be employed, Bevil concurred in that recommendation. Further, trial counsel testified that he did not read the medical reports contained in the State's file in that he believed them to be illegible, privileged at trial, and irrelevant to his good character defense.

Bevil contends variously that trial counsel was ineffective for failure to challenge the admissibility of the State's evidence. Trial counsel defended his failures to object to the admission of State evidence at trial as necessary to allow him to "employ every discrepancy in the prosecution's case that we could develop" or to illicit sympathy for him. As to the latter, after discussing the matter with Bevil, trial counsel allowed the State's expert witness as to child victims to

testify that Bevil had told him he had been molested as a child in order to minimize potential damage to his good character defense if introduced by the State. While by his brief, Bevil characterizes his trial counsel's trial strategy as "non-adversarial," the record reveals the contrary. Bevil's trial counsel filed pretrial discovery motions. He cross-examined the State's witnesses, including an exhaustive cross-examination of the victim. He established that the victim continued to call Bevil after he decided to stop seeing the victim's family; employing seven defense witnesses, he established Bevil's good character.

"Generally, the burden is on the defendant claiming ineffectiveness of counsel to establish (1) his attorney's representation in specified instances fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The trial court's determination that an accused has not been denied effective assistance of counsel will be affirmed on appeal unless that determination is clearly erroneous. In the absence of testimony to the contrary, counsel's actions are presumed strategic. The decisions on which witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions would be made, and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with the client." (Citations and punctuation omitted,) Hudson v. State, 218 Ga. App. 671, 672 (__SE2d__) (1995).

In denying Bevil's motion for new trial, the trial court found

that "[Bevil] has not established that his trial counsel's lack of independent investigation, trial strategy, or other conduct, rose to the level of harm authorizing a new trial." We have reviewed Bevil's claims of ineffective assistance and find the evidence of record insufficient as to require a finding that trial counsel's performance was deficient or that the defense was prejudiced thereby. We must affirm the trial court's finding that Bevil was afforded effective assistance of counsel since it is not clearly erroneous. That Bevil and present counsel would have proceeded differently does not establish the ineffectiveness of trial counsel. Hudson, supra. Accordingly, we deem this enumeration of error to be without merit.

8. In light of our disposition above, we need not reach the remaining enumerations of error.

Judgement affirmed. McMurray, P.J., and Andrews, J., concur.

APPENDIX B

OTHER OPINIONS

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	INDICTMENT
V.	:	
WILLIAM SCOTT BEVIL	:	NO.: 94CR -3328

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

This matter came before the court on defendant's motion for new trial. After consideration of argument of counsel, materials and pleadings on file, and the study of applicable law, it is considered, ordered, and adjudged as follows:

The Grand Jury indicted defendant for two counts of child molestation and two-counts of aggravated child molestation. The trial jury found him guilty on all counts. The defendant alleges a number of trial errors by the court and his trial attorney. The state contends that there was no error but that, even if there were, no alleged deficiency rises to the level of requisite prejudice to the defense to justify a new trial.

Defendant asserts that his trial counsel provided ineffective assistance. In order to prevail on this ground, defendant must show both his trial attorney's deficient performance and resulting prejudice, such that the verdict likely would have been different but for his attorney's ineffectiveness. Defendant alleges generally, that his trial attorney failed to prepare the case for trial, to interview witnesses, to read and examine medical reports, or to consult or subpoena psycho-

logical or psychiatric experts. More specifically, defendant asserts, and trial counsel confirmed at the April 27, 1995 hearing, that his counsel relied almost exclusively on the district attorney's open file policy in gathering information regarding possible witnesses and their statements. Trial counsel testified that he did not interview prospective witnesses in the case because he knew, from the state's file and from discussions with the assistant district attorney, what the witnesses' statements would be. Trial counsel testified that he did not read the doctors' medical reports contained in the state's file, because they were illegible, because counsel thought the information would be privileged at trial, and because they were irrelevant to defendant's good character defense. In defending his admitted lack of independent pretrial investigation and his lack of objections to the admission of state's evidence at trial, trial counsel testified that his strategy was to allow all of the state's evidence in order "to show the absurdity of the charges" against the defendant.

Counsel for the defendant raised an alibi defense the state conceded in closing argument that the defendant worked out of state for part of the time during which the indicted offenses were alleged to have occurred. There was no evidence or indication, however, that the defendant was out of state at all times the alleged acts could have occurred, in fact the evidence was to the contrary. Additional "alibi" testimony, unless it established the impossibility of the defendant committing the alleged acts, would have been cumulative at trial and nonprobative as to an alibi defense. Regarding the letter typed on the victim's family typewriter and signed in the victims name, expert

evaluation subsequent to trial indicated that the letter was, in fact, typed on that typewriter, that the date was typed on that typewriter after the text of the letter was typed, and that the victim's signature was traced over due to a defect or lack of ink in the original pen. The expert also opined that the underlying signature appeared "freely and naturally written." It is speculative, at best, to assert that the defense could have benefitted from this information at trial. Regarding defense counsels failure to question witnesses about the victim's psychological condition, trial counsel testified that it was a strategic decision to not appear to "bully" the victim by going into bed-wetting and other arguably irrelevant matters of a personal nature.

"In determining the effectiveness of counsel, this court looks to the totality of the representation provided by counsel. A defendant's right to effective assistance of counsel does not guarantee errorless counsel or counsel judged ineffective by hindsight, but counsel ... likely to render and rendering reasonably effective assistance Jacobson v. State, 201 Ga.App. 749, 412 S.E.2d 859, 864 (1991).

Defendant has established that his trial counsel's lack of independent investigation, trial strategy, or other conduct rose to the level of harm authorizing a new trial.

The court finds no merit in defendant's asserted error that a portion of voir dire was conducted outside the defendant's presence. Defendant's presence was waived for portions of voir dire of individual jurors who, because of the nature of the case, requested that they be questioned in private.

Similarly, there is no merit in defendant's asserted error that

the jury in the case was unsworn. The jury was properly sworn.

The court has carefully reviewed the remaining grounds for new trial and finds them to be without merit.

For the reasons stated above, defendant's motion for new trial is denied.

So ordered, this 23rd day of June, 1995.

/s/ Hilton Fuller, Judge
Stone Mountain Judicial Circuit

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IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
v	)	CASE NO. 94CR3328
	)	
WILLIAM SCOTT BEVIL	)	

ORDER

On February 7, 1995, the Defendant in the above-styled case filed a Motion For Declaration Of Nullity, in which the Defendant petitioned this Court to declare all previous proceedings in this case a nullity.

On February 14, 1995, this Court heard Defendant's motion. After considering the evidence presented and the arguments of counsel this Court hereby denies Defendant's motion.

So **ORDERED** this 16th day of February, 1 995.

/s/ Judge Gail Flake

Dekalb Superior Court

APPENDIX C

Order on ReHearing

SUPREME COURT OF GEORGIA

Case No. S96CO830 Atlanta, May 17, 1996

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

WILLIAM SCOTT BEVIL V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Sherie M. Welch, Clerk.

Court of Appeals

of the State of Georgia

ATLANTA, JANUARY 24, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A95A2501

WILLIAM SCOTT BEVIL V. THE STATE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

January 24,1996

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last written above.

/s/ William L. Masters III, *Clerk*

APPENDIX D

Judgment Sought To Be Reviewed

IN THE SUPERIOR COURT OF DEKALB COUNTY

THE STATE OF GEORGIA

W/M VS 10/23/66

WILLIAM SCOTT BEVIL

OFFENDER TRACKING NUMBER: 41600274

CASE NO.

OFFENSE(S) CHILD MOLESTATION (TWO COUNTS) AND AGGRAVATED CHILD MOLESTATION (TWO COUNTS

January TERM, 19 94

CT 2 merges with CT 4

☐ PLEA:
- ☐ GUILTY ON ALL COUNT(S)
- ☐ NOLO CONTENDERE ON: ON COUNT(S) _____
- ☐ TO LESSER INCLUDED OFFENSE(S) _____

☑ VERDICT:
- ☑ JURY:
- ☐ NON JURY:

ON COUNT (S) _____

☑ GUILTY ON COUNT(S) 1 - 4

☐ NOT GUILTY ON COUNT(S) _____

☐ GUILTY OF LESSER INCLUDED OFFENSE(S) OF _____ ON COUNT (S) _____

OTHER DISPOSITION
- ☐ NOLLE PROSEQUI ORDER: ON COUNT(S) _____
- ☐ DEAD DOCKET ORDER ON COUNT(S) _____ OFFENSE(S) OF _____ (SEE SEPARATE ORDER)

Count 1, 3 & 4 ☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that: The said defendant is hereby sentenced to confinement for a period of Twelve (12) years to serve Four (4) years in prison at to Counts 1, 3 & 4 all Counts to run Concurrent in the State Penal System or such other institution as the Commissioner of the State Department of Corrections may direct, to be computed as provided by law.

HOWEVER, it is further ordered by the Court:

☐ 1)THAT the above sentence may be served on probation.

☐ 2)THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of the sentence.

☐ 3)Defendant is to receive credit for time served.

☐ 4)Time to serve reduced to present time served.

☐ **FIRST OFFENDER SENTENCE**

WHEREAS, said defendant has not previously been convicted of a felony nor availed himself of the provision of the First Offender Act (Ga. Laws 1968, p. 324).

NOW, THEREFORE, the defendant consenting hereto, it is the judgment of this Court that no judgment of guilt or sentence be imposed at this time, but that further proceedings are deferred and defendant is hereby placed on probation for the period of _____ from this date provided that said defendant complies with the following general and special conditions herein imposed by the Court as part of this sentence.

PROVIDED, further, that upon violation of the terms of probation the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms of probation, or upon release of the defendant by the Court prior to the termination of the period thereof, the defendant shall stand discharged of said offense charged and shall be completely exonerated of guilt of said offense charged.

Let a copy of this Order be forwarded to the Office of the State Probation System of Georgia, and to the Identification Division of the Federal Bureau of Investigation.

☑ **GENERAL CONDITIONS OF PROBATION**

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

☑ 1)THAT defendant no violate any State or Federal laws to be adjudged by the Court;

☑ 2)THAT defendant make regular reports to the Adult Probation Officer of DeKalb County as directed;

☑ 3)THAT defendant keep the Adult Probation Officer of DeKalb County informed at all times of the defendant's place of employment and residence address;

☑ 4)THAT defendant shall, from time to time upon oral or written request by any probation officer, produce a breath, urine, and/or blood specimen for analyses for the possible presence of a substance prohibited or controlled by any law of the state of Georgia or of the United States;

☑ 5)THAT defendant pay a fine in the amount of $_____ plus $50.00 or 10% of said fine, whichever is less pursuant to O.C.G.A. 15-21-70 and pay a jail fee in the amount of $_____, drug penalty fine $_____, Victims fund $_____, and pay restitution in the amount of $_____ probation fee$ 20/mo Court Cost $_____ attorney's fee through the adult probationofficer as provided by said officer;

☐ 6)THAT defendant undergo and successfully complete any alcohol, drug, mental health or educational program abiding by all rules, regulations or directions of such program to include any aftercare deemed necessary as directed by the probation officer;

☐ 7)THAT defendant must complete _____ hours of Community Service as directed by Adult Probation;

☐ 8)THAT defendant must enter into and successfully complete the _____ program, abiding by all of their rules and regulations;

☐ 9)THAT defendant must report to the DeKalb County Jail on _____ at _____ ☐ (a.m.) ☐ (p.m.) to begin serving sentence.

☑ **OTHER CONDITIONS OF PROBATION**

IT IS FURTHER ORDERED that the defendant abide by all other general conditions of probation as set forth herein: Defendant must complete Sex Offender treatment as determined by Probation Officer. Must have no contact with victim or victims family.

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

Filed in Open Court this 14th day of February, 19 94 /s/ Gail S. McGlamery Deputy Clerk

CLERK

So ordered this 14th day of February, 19 94 /s/ Gail C. Flake

Judge, DeKalb Superior Courts

BEST AVAILABLE COPY

APPENDIX E

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2, cl.3

> The trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX F

OTHER ESSENTIAL MATERIALS

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
vs	*	INDICTMENT NO. 94-CR-3328
	*	
WILLIAM SCOTT BEVIL	*	

MOTION FOR NEW TRIAL

The Defendant, WILLIAM SCOTT BEVIL, in the above stated case comes now at the term of court at which said verdict, judgment, and sentence were rendered and within 30 days of the rendition of said sentence, moves the Court to grant a supersedeas and to set aside said verdict, judgment, and sentence and to grant a new trial in said case because:

1.

Said verdict and judgment are contrary to the law and the principles of justice and equity.

2.

Said verdict and judgment are contrary to the evidence in said case and without evidence to support same.

3.

Said verdict and judgment are decidedly and strongly against the weight of evidence.

4.

The Court erred by allowing the voir dire to be. Conducted outside the presence of the Defendant (T.T. pp. 56, 17-18).

5

The Court erred in allowing the Defendant to be tried without having first sworn in the jury as required under O.C.G.A. § 15-12-139.

6.

The Court erred in denying Defendant's Motion for Declaration of Nullity, the Defendant having been tried by a jury which was never sworn as requested under O.C.G.A. § 1512-139, and the same being in violation of Article I, Section I, Paragraphs 1, 2 and 11 of the 1983 Constitution of the State of Georgia and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution (T.T. pp. 23, 79, See hearing transcript when completed by court reporter).

7.

The Court erred in requiring the Defendant to be tried without first inquiring and demanding of the prosecution to provide Defendant with scientific reports and exculpatory material as demanded under Defendant's pre-trial Notice to Produce and Motion for Discovery filed August 16, 1994; medical and professional experts, i.e., Dr. David Smith (T.T. pp. 24-38, 125) and Dr. Craig Rich (T.T. pp. 9495, 97-99, 103, 125-127).

8.

The Court erred in admitting into evidence a letter allegedly written by victim (S-1) no proper foundation having been laid by the State (T.T. pp. 30-31).

9.

The Court erred in allowing Dr. David Smith to testify as to hearsay regarding his conversation with Mrs. Mayenschein (T.T. pp. 34-35).

10.

The Court erred in allowing Dr. David Smith to testify regarding his belief as to what knowledge Dr. Craig Rich had regarding the alleged victim's story (T.T. p. 35).

11.

The Court erred in allowing the State to ask leading questions of its own expert, Dr. David Smith (T.T. pp. 29-38, 43-44).

12.

The Court erred in allowing the State to ask leading questions of the alleged victim (T.T. pp. 60-78).

13.

The Court erred in admitting into evidence, over the objection of Defendant, State's Exhibits 2, 3, 4 and 5 which were photographs of the alleged victim and the Defendant which were irrelevant and no proper foundation having been laid (T.T. pp. 77-86).

14.

The Court erred in prohibiting Defendant from inquiring as to the victim's homosexual conversations (T.T. pp. 95-99) and admonishing the jury to disregard.

15.

The Court erred in allowing the State to prevent evidence of other alleged crimes in other jurisdictions (T.T. pp. 106, 131-132, 156).

16.

The Court erred in allowing the Defendant to respond to the State's inquiry about "his duty to testify" as self-serving and prejudicial (T.T. pp. 107-108).

17.

The Court erred in allowing Detective H. P. Brown to testify as to statements allegedly made by Defendant while in police custody without first allowing Defendant the right to a Jackson Denno hearing (T.T. pp. 143-144, 157159).

18.

The Court erred in allowing the State to inquire of Detective H. P. Brown about contents of a videotape which had not been admitted into evidence (T.T. pp. 151-152).

19.

The Court erred in admitting into evidence S-6 (videotaped interview of alleged victim) without having laid the proper foundation (T.T. pp. 152-154).

20.

The Court erred in allowing S-6 to be played to the jury (T.T. pp. 154).

21.

The Court erred in allowing S-6 to be played to the jury without the court reporter taking down the contents to said video tape (T.T. p. 154).

22.

The Court erred in allowing Detective H. P. Brown to render opinion evidence, over the objection of Defendant, regarding the "usual" memory retention of a child alleging a number of incidents (T.T. pp. 156-157).

23.

The Court erred in allowing Detective H. P. Brown to testify as to his opinion regarding Defendant's reason for denying any guilt of the charges against him (T.T. p. 159).

24.

The Court erred in allowing Detective E. P. Brown to testify regarding improper questioning of the Defendant and drawing conclusions that Defendant had been previously molested (T.T. pp. 158-159).

25.

The Court erred in allowing Detective H. P. Brown to give testimony regarding his grand jury appearance and preliminary hearing appearance (T.T. p. 160).

26.

The Court erred in allowing the State to ask a series of leading questions on re-direct to Detective H. P. Brown (T.T. pp. 165-166).

27.

The Court erred in allowing Detective H. P. Brown to give a series of opinion and conclusion testimony regarding the "appropriate" expectations and memory of a child molestation victim (T.T. pp. 165-166).

28.

The Court erred in allowing the District Attorney to inquire into the Defendant's previous victimization by a child molester some 15 years ago (T.T. pp. 209-216).

29.

The Court erred in sending out a copy of the Court's jury charges to the jury during deliberation (T.T. pp. 225, 245).

30.

The Court erred in sending the videotape interview (S-6) of the alleged victim out with the jury and allowing said jury to-play and re-watch same and portions of same during jury deliberations (T.T. pp. 247-249).

31.

The Court erred in its charge to the jury in charging that Aggravated Child Molestation occurs only as to that "which involves an act of sodomy", when in fact O.C.G.A. § 16-6-4(c) also provides "which act physically injures the child" as well (T.T. p. 235).

32.

The Court erred in its charge to the jury in failing to charge a material element, the definition of Isarouse or satisfy the sexual desires."

33.

The Court erred in failing to charge the jury as to the proper form of the verdict in charging that the jury in finding the Defendant guilty to "insert in that blank the specific charge for which you have found the Defendant guilty ... " while to the contrary charging the jury if you find the Defendant not guilty "you would insert in there the number of the count ... " the same being confusing and suggestive to the jury (T.T. p. 236).

34.

The Court erred in failing to grant Defendant's Motion for Directed Verdict of Acquittal after the close of the State's case in that the Defendant's testimony is so vague, conflicting and ambiguous as

to dates, time and places that it is *mere speculation in arriving at any* determinations as set forth in the indictment (T.T. p. 168).

35.

Defendant is entitled to a new trial in that he was denied his constitutional rights to due process and effective assistance of counsel as a result of the following omissions of Defendant's counsel:

(a) The Defendant had defenses which were not presented by defense counsel;

(i) Alibi;

(b) Defendant's counsel failed to consult sufficiently with the Defendant and/or ill advised the Defendant;

(i) Defendant's counsel should have inquired as to Defendant's out of state employment during the period of time alleged in the indict ment;

(ii) Defendant's counsel advised Defendant that he should not obtain a private investigator to investigate witnesses and facts;

(iii) Defendant's counsel advised Defendant that there was no need to prepare for the case be cause it would never proceed to trial;

(c) Defendant's counsel failed to adequately investigate the facts and the law;

(i) See paragraphs under subsection (a), (b), (d) and (e);

(d) Defendant's counsel was inadequately prepared for trial;

(i) See paragraphs under subsection (a), (b), (c) and (e);

(e) The following actions taken by trial counsel were in sufficient to amount to effective representation of counsel and Defendant has also been denied the guarantees of due process of law:

(i) By allowing the voir dire to be conducted outside the presence of the Defendant (T.T. pp. 56, 17-18).

(ii) In requiring the Defendant to be tried with out first inquiring and demanding of the prosecution to. Provide Defendant with scientific reports and exculpatory material as demanded under Defendant's pre-trial Notice to Produce and Motion for Discovery filed August 16, 1994; medical and professional experts, i.e., Dr. David Smith (T.T. pp. 24-38, 125) and Dr. Craig Rich (T.T. pp. 94-951 97-99, 103, 125-127).

(iii) In allowing into evidence without objection S-1 no proper foundation having been laid by the State (T.T. pp. 30-31).

(iv) In allowing without objection Dr. David Smith to testify as to hearsay regarding his

conversation with Mrs. Mayenschein (T.T. pp. 34-35).

(v) In allowing without objection or proper foundation Dr. David Smith to testify regarding his belief and opinion as to what knowledge Dr. Craig Rich had regarding the alleged victim's story (T.T. p. 35).

(vi) In allowing without objection the State to ask leading questions of its own expert, Dr. David Smith (T.T. pp. 29-38, 43-44).

(vii) In allowing without objection the State to ask leading questions of the alleged victim (T.T. pp. 6078).

(viii) In allowing into evidence, without requiring the State to show relevancy or to lay the proper foundation State's Exhibits 2, 3, 4 and 5 (T.T. pp. 77-86).

(ix) In allowing the State to present evidence of other alleged crimes in other jurisdictions without objection or legal foundation (T.T. pp. 106, 131132, 156).

(x) In allowing the Defendant to respond to the State's inquiry about "his duty to testify" as self-serving and prejudicial without objection or legal foundation (T.T. pp. 107-108).

(xi) In allowing Detective E. P. Brown to testify

as to statements allegedly made by Defendant while in police custody without objection and without exercising the Defendant's right to a Jackson Denno hearing (T.T. pp. 143-144, 157-159).

(xii) In allowing the State to inquire of Detective E. P. Brown about contents of a videotape which had not been admitted into evidence without objection or proper foundation (T.T. pp. 151-152).

(xiii) In allowing into evidence S-6 (videotaped interview of alleged victim) without objection or requiring the State to lay the proper foundation (T.T. pp. 152-154).

(xiv) In allowing S-6 to be played to the jury with out objection as to prejudice (T.T. pp. 154).

(xv) In allowing S-6 to be played to the jury with out requiring the court reporter to take down the contents to said video tape (T.T. p. 154).

(xvi) In allowing Detective E. P. Brown to testify without objection and without proper qualification or foundation as to his opinion regarding Defendant's reason a for denying any guilt of the charges against him (T.T. p. 159).

(xvii) In allowing Detective H. P. Brown to testify without objection and without proper quali-

fication or foundation regarding improper questioning of the Defendant and drawing conclusions that Defendant had been previously molested (T.T. pp. 158-159).

(xviii) In allowing Detective H. P. Brown to give testimony regarding his grand jury appearance and preliminary hearing appearance without objection as to relevancy or prejudicial effect (T.T. p. 160).

(xviiii) In allowing the State to ask a series of leading questions without objection on re-direct to Detective H. P. Brown (T.T. pp. 165-166).

(xx) In allowing Detective H. P. Brown to give a series of opinions and conclusion testimony without objection, proper qualification or foundation regarding the "appropriate" expectations and memory of a child molestation victim (T.T. pp. 165-166).

(xxi) In allowing the District Attorney to inquire into the Defendant's previous victimization by a child molester some 15 years ago with out objection as to relevancy, qualification, prejudice or foundation (T.T. pp. 209-216).

(xxii) In consenting to sending out a copy of the Court's jury charges to the jury during deliberation (T.T. pp. 225, 245).

(xxiii) In failing to object to the sending of the videotape interview (S-6) of the alleged victim out with the jury and allowing said jury to play and re-watch same and portions of same during jury deliberations (T.T. pp. 247-249).

(xxiv) And in failing to move for a mistrial when discovered that the jury had been playing S-6 at will during deliberation; the same being prejudicial as a continuing witness to be reviewed again and again after the close of the evidence, in violation of due process under the Constitution and laws of the State of Georgia and the United States Constitution.

/s/ Donn M. Peevy

DONN M. PEEVY
Attorney for Defendant
State Bar No. 570650

Peevy & Lancaster, P.C.
572 Buford Drive
P. 0. Box 1264
Lawrenceville, Georgia 30246
(404) 963-0858

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Motion For New Trial upon the opposing counsel:

Mr. Jeffrey M. Brickman
Assistant District Attorney
556 W. McDonough Street
Decatur, Georgia 30030

by hand delivering the same,.

This 10th day of March, 1995.

/s/ Donn M. Peevy
DONN M. PEEVY

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA *

vs * INDICTMENT NO. 94-CR-3328

WILLIAM SCOTT BEVIL *

AMENDMENT TO MOTION FOR NEW TRIAL

Comes now the Defendant and files this his Amendment to his Motion for New Trial filed on February 14, 1995 and March 10, 1995 and by re-adopting those Motions and adding as follows:

1.

By amending Paragraph 35 under subsection (e) to read:

"(xxv) In failing to insist (and in subsequently with drawing) upon his line of questioning the alleged victim about his "conversations" regarding homosexual discussions with Dr. Rich (T.T. pp. 95-99).

(xxvi) In failing and refusing to move the Court to allow the Defendant to have S-1, the alleged victim's letter, examined by experts for evidence of alteration, fraud and/or forgery in view of the State's own evidence which shows that the letter was previously undated when law enforcement first acquired a copy of said letter (T.T. pp. 87-88, 150-152, 161).

(xxvii) In failing to except to the Court's charge on the definition of Aggravated Child Molestation as well as to except to the Court's failure to charge the definition of "arouse or satisfy the sexual desire".

(xxviii) In failing to except to the Court's charge as to the form of the verdict, the same being confusing and/or suggestive to the jury for a find ing of guilty against the Defendant.

(xxvix) In failing to acquire expert testimony to examine and review the letter (S-1) and oral statements (S6) of the alleged victim to determine whether such statements were typical or atypical of actual victims and if not to tender the evidence of such experts as to the authenticity. Of the language of such victim." (See the opinion and conclusions of Deloris T. Roys, LCSW, Director, Highland Institute for Behavioral Change, Inc. and made a part of the record at the motion and sentencing hearing on February 14, 1995, pp. 93-95).

2.

By adding Paragraph 36 as follows:

"36.

The Court erred at the outset and before trial in failing to inform the Defendant of his bias, prejudice and personal experience

which adversely affects the Court's judgement against persons charged with offenses for which the Defendant was charged, the reasons for which the Court articulated at the original sentencing hearing on January 9, 1995 and of which the Court recused himself from said sentencing hearing (Sentencing hearing January 9, 1995, pp. 19-22 and Order of Recusal entered January 30, 1995)

3.

By adding Paragraph 37 as follows:

"37.

The Court erred in not recusing himself prior-to the trial of this case due to bias, prejudice and personal experience which adversely affects the Court's judgment as set forth in the sentencing hearing on January 9, 1995, pp. 19-22 and as otherwise cited in his Order of Recusal entered on January 30, 1995."

WHEREFORE, Defendant prays that this his Amendment be allowed.

/s/ Donn M. Peevy

DONN M. PEEVY
Attorney for Defendant
State Bar No. 570650

Peevy & Lancaster, P.C.
572 Buford Drive
P. 0. Box 1264
Lawrenceville, Georgia 30246
(404) 963-0858

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Amendment to Motion For New Trial upon the opposing counsel:

Mr. Jeffrey M. Brickman
Assistant District Attorney
556 N. McDonough Street
Decatur, Georgia 30030

by hand delivering the same.

This 27th day of April, 1995.

/s/ Donn M. Peevy
DONN M. PEEVY

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	CRIMINAL ACTION
vs	*	
WILLIAM SCOTT BEVIL	*	FILE NO. 94-CR-3328

OBJECTION TO IMPOSITION OF SENTENCE

AND MOTION FOR DECLARATION OF NULLITY

Now comes the Defendant in the above.-styled action and files this his Objection to Imposition of Sentence and Motion for Declaration of Nullity and shows the Court as follows:

1.

The Defendant was tried in the above-styled action before the Honorable Hilton Fuller.

2.

A jury was empaneled to try said case but was never sworn nor otherwise administered an oath as prescribed in O.C.G.A. §15-12-139.

3.

The jury returned a verdict finding the Defendant guilty and he now awaits sentencing.

4.

Defendant objects to being sentenced in that he has not been afforded a trial pursuant to Georgia Law and to sentence said Defendant would be violative of the Fifth, Sixth and Fourteenth Amend-

ments to the United States Constitution and Article I, Section I, Paragraphs 1, 2 and 11 of the 1983 Constitution of the State of Georgia.

WHEREFORE, Defendant prays that his Motion be granted and that he be given the opportunity to be tried pursuant to Georgia Law and the United States and Georgia Constitutions as set forth above.

Respectfully submitted this 7th day of February, 1995.

/s/ Donn M. Peevy

DONN M. PEEVY
Attorney for Defendant
State Bar No. 570650

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(404) 963-0858

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA,	*	CRIMINAL ACTION
vs.	*	FILE NO. 94-CR-3328
WILLIAM SCOTT BEVIL,	*	

Defendant.

DEMAND FOR COPY OF INDICTMENT,

LIST OF WITNESSES

AND MOTION FOR DISCOVERY

TO: HON. J. TOM MORGAN, DISTRICT ATTORNEY

As the Defendant in the above-styled and stated case and through my attorney of record, make demand upon you, as District Attorney, for a copy of the bill of indictment in aid case, a list of the names of the witnesses upon whose testimony such charge is founded.

Defendant further moves that the State produce and provide to the Defendant any and all evidence, information, or material favorable to the Defendant, either as to guilt or to punishment, pursuant to Brady vs. Maryland, 373 U.S. 83 1963).

This 16th day of, 1994

140 Brown Street
Covington, Georgia 30209
(404) 787-2550

/s/ John B. Degonia
Attorney for Defendant

CERTIFICATION OF SERVICE

This is to certify that I have as of this date served Mr. J. Tom Morgan, District Attorney, 700 DeKalb County Courthouse, Decatur, Georgia 30030-3356, with a copy of DEMAND FOR COPY OF INDICTMENT, LIST OF WITNESSES AND MOTION OR DISCOVERY by personal delivery.

This the 16th day of August 1994.

/s/ John B. Degonia

AFFIDAVIT

After first being duly sworn, the undersigned disposes and says:

1. My name is Deloris Tyler Roys.

I earned a Masters Degree in Social Work at the University of Georgia, and I am a Licensed Social Worker in the State of Georgia, license number 001752. I am currently pursuing a Ph.D. in Clinical Psychology.

I was adjunct faculty from September 1985 through August 1988 at The American College For Applied Arts in Atlanta. Among other courses, I taught Introductory Psychology, Introductory Sociology, and Deviance and Social Control. I also maintained a private sex therapy practice from June 1987 to January 1988.

In February 1988 I established and opened The Highland Institute for Behavioral Change, Inc. (of which I am the Director) , a private psychotherapy practice for the evaluation and treatment of sex offenders and those with sexual compulsive disorders. In my present position I evaluate and treat sex offenders, as well as train therapists in this field. Since starting my practice I have conducted sex offender evaluations on approximately 700 adult and adolescent males.

I am a noted expert witness in sex offender cases in most of

the counties in the Atlanta metro area, as well as in Tennessee and Alabama. I have conducted numerous workshops in sex offender evaluation and treatment.

I have several hundred hours of training as a sex offender specialist, as well as 42 hours of training in sex therapy from Guelph University, Ontario, Canada. I am a member of six national professional organizations which are relevant to my work with sex offenders (National Association of Social Workers; American Association of Sex Educators, Counselors, and Therapists; Sex Information and Education Council of the United States; Society for the Scientific Study of Sex; Association for the Treatment of Sexual Abusers; American Professional Society on the Abuse of Children). One of these, Association for the Treatment of Sexual Abusers, is an international organization whose members are researchers and clinicians specializing in the evaluation and treatment of sex offenders, and I have been a member since starting my practice.

I meet the Standards of Care promulgated by the Association for Treatment of Sexual Abusers.

2. Scott Bevil first came to The Highland Institute for Behavioral Change, Inc., for a sex offender evaluation on January 12, 1995. Mr. Bevil stated: (a) he had been charged with

child molestation; (b) he had been found guilty by a DeKalb County Court; (c) that he was currently appealing his conviction; (d) that he wanted a sex offender evaluation to help establish whether he in fact had any sexual issues that needed attention.

3. The sex offender evaluation process that I utilize is extensive. I conduct a two-hour intake interview, followed by 6 to 8 hours of paper-and-pencil testing, as follows: Minnesota Multiphasic Personality Inventory (MMPI), Shipley Hartford I.Q. Screen, Semantic Differential Test, Draw A Person (modified) , Multiphasic Sexual Inventory (MSI) , Clarke Sexual History, Sexual Interest Card Sort, Substance Abuse Subtle Screening Inventory (SASSI). After this the individual enters the laboratory for a plethysmograph (a psychophysiological measure of sexual arousal) in which he is presented with audio and visual stimulus material of all age categories of males and females. The audio themes are consenting or non-consenting in nature. There is also a segment of non-sexual violence to measure arousal to images of a man hurting a woman in a number of ways.

4. The raw data from the MMPI, MSI, Draw-A-Person, Shipley Hartford I.Q. Screen, and Semantic Differential Test are sent to H.R. Nichols, Ph.D. for examination, scoring and comparison with admitted sex offenders (N=2000). An interpretive

report by Dr. Nichols is returned to me for inclusion with all other test data that I have derived. I also staff each case with my clinical supervisor, Robert J. Timms, Ph.D., and with my clinical treatment team. This was done in Mr. Bevil's case.

5. A report of the evaluation of Mr. Bevil including specific scoring patterns was mailed to his attorney, Mr. Donn M. Peevy on January 23, 1995.

6. Validity scales on test materials were found to be within normal limits which not only suggests that the test results were reliable and valid but that for the most part Mr. Bevil was found to be open and disclosing about personal and sexual matters.

7. Mr. Bevil did not show elevation on the test characteristics of untreated sex offenders. In view of these results, I did not recommend sex offender treatment for Mr. Bevil.

8. In addition to the above tests and interview data I also read a transcript of the videotape interview of Mitchell Mayenschein by Detective H.P. Brown on October 5, 1994. I was struck by the seeming lack of detail that Mitchell was able to offer in this interview; it was most atypical of information that is usually forthcoming from our young victims.

9. I met with Scott Bevil on January 16, 1995 to discuss the results of testing with him and informed him that I could find no reason to recommend treatment or further psychological investigation.

Further affiant sayeth not. Deloris Tyler Roys

State of Georgia, County of Dekalb

Sworn and subscribed to before
me this date the 13th day of February
of 1995.

_____

Notary Public

My commission expires: July 28, 1995

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

THE STATE	*	
	*	
vs.	*	CRIMINAL ACTION
	*	
WILLIAM SCOTT BEVIL	*	FILE NO. 94-CR-3328

AFFIDAVIT

GEORGIA, NEWTON COUNTY

Before me, an officer of the State of Georgia authorized by law to administer oaths, personally appeared John B. Degonia, who on oath says:

That he is 55 years of age, sui juris, and of sound mind, a licensed attorney in the State of Georgia, Bar No. 16200.

I represented Scott Bevil in the trial of the above-referenced matter and, on the date of the trial, Assistant District Attorney Jeffrey Brickman approached me and asked me if I had seen the Judge swear in the jury. I answered. "No." Then Mr. Brickman said. "Let's stipulate for the record that the jury has been sworn." I agreed. To the best of my knowledge, at no time before, during, or after the proceedings was the trial jury administered the oath as required under O.C.G.A. 15-12-139.

This fact was stipulated to by the State and myself as evidenced in the trial transcript page 79 lines 16-25.

Further affiant sayeth not.

This 27th day of 1995.

/s/ John B. Degonia

Subscribed to and sworn to
before me this 27th day
of January, 1995.

Notary Public

We, the Jury, find the defendent guilty on all counts.

/s/ David A. Brown , Foreperson

December 1, 1994

STATE'S WITNESSES:

Det. H. P. Brown - DKPD

43 Case Reassigned to Div. 5

No. ~~94-CR-~~ 3328 Date February 2, 1995

DeKalb Superior Court

July Term, 1994

THE STATE

VERSUS

WILLIAM SCOTT BEVIL

D00144719

CHILD MOLESTATION (TWO COUNTS) AND

AGGRAVATED CHILD MOLESTATION (TWO COUNTS)

TRUE BILL

/s/ David O. Willis FOREPERSON

The Defendant waives copy of Indictment, list of witnesses, full panel, formal arraignment, and pleads

Not Guilty

This the 22 day of November 19 94

/s/ Jeffrey Brickman District Attorney

/s/ John B. Degonia Defense Attorney

/s/ William Scott Bevil Defendant

FILED
DEKALB CO., GA
CRIME
JUL 29, 9:03 AM '94
CLERK OF SUPERIOR COURT
DEKALB COUNTY, GA.